Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STAFF SERGEANT MICHAEL J. GODSHALK,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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October 1996

40 pp

QUESTION PRESENTED

Whether appellant's pleas of guilty were induced or he suffered any other prejudice as a result of his government provided defense counsel acting as a police agent in order to effect his apprehension, thus violating his Fifth Amendment right to due process and Sixth Amendment right to counsel.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Staff Sergeant Michael J. Godshalk, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 18 September 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at —— M.J. —— (1996), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 18 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1259(3) (West Supp. 1995) and 10 U.S.C. Sec. 867(a) (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

> No person shall . . . be deprived of life, liberty or property, without due process of law.

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

While stationed in Korea, the petitioner, an active duty member of the Air Force, despondent over discovery of the adulterous relationship of his wife, misappropriated a government vehicle and weapon, abducted his wife's paramour at gun point and took him for a ride eventually letting him go unharmed. The petitioner then went into hiding for several days only to emerge to call his duty station, Osan Air Base, Korea, and talk with several individuals there.

The petitioner spoke to a Chaplain, members of his unit, and also sought representation of counsel by calling the Area Defense Counsel—the military attorney stationed at the installation authorized to represent military members pending adverse criminal or administrative proceedings, such as trial by court-martial. He spoke to Captain Carmen Battle, the only attorney at Osan Air Base designated as a defense counsel. He asked her to represent him and she agreed. She promised that their conversations

were confidential and that she would represent him and his interests alone.

Captain Battle and the petitioner had numerous conversations over a several day period. Captain Battle also spoke to the Chaplain and others to learn about the petitioner's situation. She learned that the petitioner had spoken of suicide and made threats to kill himself. She soon spoke with military police officials (Office of Special Investigations) and agreed to act as their agent in an effort to lure the petitioner into apprehension. Thus she was acting in this capacity as a police agent when she promised the petitioner she had arranged mental health treatment and that he would not serve more than a year in confinement for his offenses if he surrendered voluntarily. Based upon her assurances that she was acting in his interests, the petitioner surrendered—only to be informed by Captain Battle that she had, in fact, been acting as a police agent and did not represent him. She told him that she had not arranged a deal in return for his surrender as she had promised and that, in fact, she would likely be a witness against him if he pled not guilty at his court-martial. As a result, at trial, the petitioner plead guilty to wrongful appropriation of government property (3 specifications), assault with a dangerous weapon, and kidnapping; 10 U.S.C. §§ 921, 928 and 934. He was sentenced to a punitive discharge, five years confinement, partial forfeitures of pay and allowances, and reduction to the lowest enlisted rank.

REASONS FOR GRANTING THE WRIT

APPELLANT'S PLEAS OF GUILTY WERE INDUCED AND HE SUFFERED OTHER PREJUDICE AS A RESULT OF HIS GOVERNMENT PROVIDED DEFENSE COUNSEL ACTING AS A POLICE AGENT AND THEN EFFECTING HIS APPREHENSION, THUS VIOLATING HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO COUNSEL

An accused has Constitutionally guaranteed rights, founded in the Fifth Amendment's right to Due Process and the Sixth Amendment's right to assistance of counsel, to a defense counsel not only free of conflicts of interest but to that attorney's undivided loyalty. *See Wood v. Georgia,* 450 U.S. 262, 272 (1981). A counsel may not assist in the prosecution of an individual whom he represents or has represented in the same or related matter at any time. It makes no difference that the attorney-client relationship is later terminated. *United States v. Green,* 5 U.S.C.M.A. 610, 613-615, 18 C.M.R. 234, 237-239 (1955). When an attorney subsequently takes a position contrary to his client's or former client's interest, it is immaterial that the attorney did not divulge confidential communications from his client or former client. *United States v. Green,* 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955). "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States,* 315 U.S. 60, 76 (1942) (citations omitted).

At the petitioner's trial, it was uncontested that Captain Battle, the military attorney designated by miliary authorities as defense counsel for the installation, established an attorney-client relationship with the petitioner but subsequently agreed to work as a police agent in order to effect petitioner's apprehension. While working as a gov-

ernment agent but still feigning to act as petitioner's counsel, Captain Battle discussed his case with him while police agents were monitoring the conversations, made promises to the petitioner that she had negotiated terms for him if he surrendered voluntarily, when she had not, and then convinced him to do so. When the petitioner surrendered, she informed him that she was no longer his counsel, that she had been, in fact, acting as a police agent since shortly after the establishment of their attorney-client relationship, that her promised arrangements with the government were false, and that, in fact, if he litigated the issue of his innocence, she would likely be called as a witness against him. Not surprisingly, the petitioner felt he had no choice but to plead guilty.

CONCLUSION

This clearly was a violation of the petitioner's Fifth and Sixth Amendment rights to conflict free counsel and had an impermissible chilling effect upon an accused right to plead not guilty. Any such conviction based upon a guilty plea given these circumstances can not be allowed to stand.

Respectfully submitted,

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